

JAN - 7 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554 OFFICE OF THE SECRETARY

In re Applications of

RAYMOND W. CLANTON

LOREN F. SELZNICK

For Construction Permit for a
 New FM Station on channel 279A
 in El Rio, California

MM DOCKET NO. 93-87

File No. BPH-911216MC

File No. BPH-911216MD

To: Honorable John M. Frysiak
 Administrative Law Judge

PARTIAL OPPOSITION TO WITNESS NOTIFICATION

Loren F. Selznick respectfully opposes--only in part-- the late-served "Witness Notification" faxed by counsel for Raymond Clanton (hereafter "Clanton") on January 6, 1994. ^{1/}

1. Selznick will appear for cross-examination.
2. Selznick opposes Clanton's attempt, however, to require the testimony next Wednesday-- at hearing in Washington-- from three non-parties to this proceeding. First, Selznick questions the jurisdiction and power of the FCC to compel the appearance at

^{1/} Selznick does not object to having received Clanton's Witness Notification late on January 6, 1994. Clanton's counsel most courteously did not object last week when Selznick's counsel was confused, because of errors by the FCC's Dockets Section, about the 12:00 Noon deadline for the service of Selznick's Direct Case testimony.

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hearing in Washington, DC, next week of any non-party who neither works nor resides within 100 miles of the place of the hearing.

3. Second, none of the three non-parties that Clanton requested has submitted any direct testimony in this case.

4. Third, to the extent that Selznick has submitted portions of the deposition testimony of Mr. Joseph Dailey as part of her Written Case, Selznick would have no objection should Clanton move at hearing to introduce all or any portion of Mr. Dailey's three-hour, 113-page deposition transcript "into evidence". ^{2/} Indeed, each of the matters on which Clanton now wishes to cross-examine Mr. Dailey was raised by Clanton's attorney at the deposition and Mr. Dailey gave a full and complete response which Selznick is willing to admit into the hearing record. ^{3/} In fact, approximately fifty-eight (58) of the 113 pages of his November 1993 deposition transcript are devoted to Mr. Dailey's responses to Clanton's questions about the matters on which Clanton

^{2/} The Commission is required to consider all of the pleadings and documents in a comparative hearing proceeding--not just those formally received "into evidence." See Charisma Broadcasting Corp., 8 FCC Rcd 864 ¶3 (1993); see also 5 USC § 556(e).

^{3/} For example, Clanton now says that he wants to examine Mr. Dailey "on his conversations with Ms. Selznick prior to the filing of her application and on his balance sheet." See Clanton's "Letter Notification" at 1-2. At his deposition, Mr. Dailey was examined exhaustively on these matters. See Dep. Tr. at 18; 28-29; 31-49; 52-3; 56-8; 65-7; 81-2; 85; 89; 91-104; 110. Clanton also states that Mr. Dailey's testimony is needed with respect to his proposed loan of \$40,000. See Clanton's "Letter Notification" at 2. At his deposition, Mr. Dailey was examined extensively on this matter. See Dep. Tr. at 61-2; 65-7; 72-4; 76; 88-92. These deposition transcript pages will be made available to the Presiding Judge upon request. Many of these deposition transcript pages have been appended to various pleadings.

on now wants to re-question Mr. Dailey next week in Washington. Admission into evidence of Mr. Dailey's transcript, or portions thereof, is not only the most logical and efficient response to Clanton's request, it is implicitly mandated by the Commission's recently revised hearing rules, which are designed to simplify and expedite comparative proceedings by encouraging "written pleadings" and by reducing the cross-examination of witnesses. See generally Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 162 (1991) (FCC revises rules to limit oral testimony at hearing and to encourage written cases); see also 47 CFR § 1.248(d)(4) (oral testimony permitted only where public interest strictly requires).

5. Fourth, Clanton's request would likely work a hardship on Mr. Dailey, a practicing lawyer and entrepreneur who lives in Anaheim, California, and whose litigation and business schedule was so difficult during the past three months that the scheduling last fall of his deposition itself was a major undertaking for the parties. Selznick, who has no control over Mr. Dailey's schedule and is unaware of his availability next Wednesday, would likely be prejudiced should the Presiding Judge order Mr. Dailey to testify and Mr. Dailey be absent through no fault of Selznick.

6. With respect to Clanton's request to cross-examine "an appropriate representative of Miller & Associates" and appraiser H. Chuku Lee, it is a sufficient response for Selznick to note

that Clanton made no attempt to depose either of these "non-parties" during the past 3-4 months. Shortly after Selznick's August 30, 1993 Petition for Leave to Amend was filed and after the Presiding Judge added issues against Selznick, Clanton could have sought to depose either or both of these out-of-town "non-parties" but chose not to do so. Clanton's belated request to "conduct discovery at hearing" with respect to these witnesses is abusive and should be denied. Presiding Judge Frysiak has already ruled in this proceeding that he will NOT permit the hearing to be used for discovery purposes. ^{4/}

7. In any event, the testimony of these witnesses would be cumulative and is clearly unnecessary. Ms. Selznick is the sponsor of the pertinent exhibits, Ms. Selznick is the person who revised her cost budget in 1993 because of changed circumstances, Ms. Selznick is the person who supervised the appraisal of her two New York properties and corrected the appraiser's work when she discovered an error. Ms. Selznick can be cross-examined fully on these matters, which are of only peripheral relevance in this case. Furthermore, it would likely work an unreasonable hardship on these non-party, out-of-town witnesses to require them to travel to Washington at great inconvenience and expense. ^{5/}

Clanton has failed to make the compelling showing that would

^{4/} See Deposition Transcript of Loren Selznick at 25.

^{5/} For example, Mr. Brett Miller lives in California and would be required to "lose" a minimum of three days from his business to travel back and forth for a hearing in Washington, D.C.


justify the Presiding Judge's requiring the attendance of either of these two "non-parties" at the hearing next Wednesday. See Hearing Reform Rules, supra, 6 FCC Rcd at 162.

8. Finally, Clanton's "reservation" of a "right" to cross-examine Peter Tannenwald, Esq., is -- as a threshold matter -- procedurally defective. The Presiding Judge set January 6, 1994 as the date for the notification of witnesses. Mr. Tannenwald was not noticed by Clanton. Clanton has no "right" to "reserve" himself the option of later noticing Mr. Tannenwald. Thus, without even addressing the merits of Clanton's flawed attempt to justify Mr. Tannenwald's testimony, Selznick merely notes that Mr. Tannenwald was not noticed on the date that the Presiding Judge established for notification of witnesses.

CONCLUSION

Selznick's partial opposition to Clanton's Witness Notification should be sustained and no witness, other than Ms. Selznick, should be required to testify at next Wednesday's hearing in Washington, DC.

Respectfully submitted,


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January 7, 1994

CERTIFICATE OF SERVICE

I, Dina Etemadi, do certify that a copy of the foregoing
"Partial Opposition to Witness Notification" was served by hand
on this 7th day of January 1994, on the following:

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